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No. 10-490

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In The Supreme Court of the United States

STATE OF UTAH,

Petitioner,

v.

MARK ANTHONY OTT,

Respondent.

On Petition For Writ Of Certiorari To The Utah Supreme Court

BRIEF OF *AMICUS CURIAE* THE NATIONAL CRIME VICTIM LAW INSTITUTE SUPPORTING PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational organization located at Lewis & Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; technical assistance to attorneys; promotion of the National Alliance of Victims' Rights Attorneys; and research and analysis of developments in crime victim law. In addition, NCVLI actively participates as *amicus curiae* in cases involving crime victims' rights nationwide. This case involves the fundamental right of all crime victims to be fully heard at sentencing.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and have been given at least 10 days notice of *amicus curiae*'s intention to file it.

REVIEW IS WARRANTED ON THE IMPORTANT QUESTION OF WHETHER THE CONSTITUTION BARS VICTIMS FROM COMMENTING ON THE APPROPRIATE SENTENCE DURING DELIVERY OF THEIR VICTIM IMPACT STATEMENT AT SENTENCING.

REASONS FOR GRANTING THE PETITION

In the case below, the Utah Supreme Court held that it constitutes cruel and unusual punishment for family members of a murder victim to offer their opinion regarding the appropriate sentence for the murderer. The decision squarely presents the question whether the Eighth Amendment erects a *per se* bar against a victim's sentencing recommendation, a question this Court deferred in *Payne v. Tennessee*, 501 U.S. 808 (1991). While *Payne* overruled parts of the Court's earlier opinion in *Booth v. Maryland*, 482 U.S. 496 (1987), barring general victim impact evidence, the Court specifically reserved the question of whether it should likewise overrule that part of *Booth* that the Court described as barring crime victims from delivering opinions on the proper sentence. Despite the characterization in *Payne*, the Court did not have the question of sentencing recommendations squarely presented in *Booth*. Consequently, whether the Eighth Amendment erects such a bar has not been ruled upon and therefore the answer is far from clear.

The ambiguity of the interaction between *Payne*'s overruling of *Booth* and the scope of *Booth*'s original

holding has created significant confusion among lower courts regarding the scope of permissible victim impact statements and has resulted in a split of authorities in the lower courts, as the State of Utah has explained at length in its petition for certiorari. *See also* Elijah Lawrence, *Victim Opinion Statements: Providing Justice for Grieving Families*, 12 J. L. & FAM. STUDIES 511, 522 (2010) ("The split in authority in the lower courts is apparent. This state of confusion is the result of the U.S. Supreme Court's ambiguous holding in *Booth*, followed by its obfuscating opinion in *Payne*. Some courts are construing the Court's ruling in *Payne* to mean the Eighth Amendment creates a *per se* bar on the admission of victim opinion statements in capital cases."); Wayne A. Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517, 528 (2000) (reviewing authorities and noting that "it is readily apparent that marked uncertainty now persists over the extent, and indeed the continued existence, of the prohibition [against victim sentencing recommendations] ostensibly established in *Booth*"). Perhaps even more important, this confusion among the lower courts is undermining key aspects of victims' rights codified in all 50 states and the District of Columbia, and impeding legislative action to further develop these rights.[2]

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[2] *See* Douglas E. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U. L. REV. 1135, 1169 (2007) (noting that victims' rights exist in every state

(Continued on following page)

Only this Court can untangle the situation and settle the dispute splitting the courts below. There is no value in letting the conflict continue to percolate because courts on each side have, after expressly considering the alternative, repeatedly stated their conflicting opinions. Further, continuation of the status quo means ongoing deprivation of victims' constitutional and statutory rights to be heard freely, which in turn stymies the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

I. This Court Should Review the Important Question of Whether the Eighth Amendment Erects a *Per Se* Bar Against a Crime Victim Offering a Sentencing Recommendation.

A. The Court's Opinions are the Origin of the Confusion Regarding the Scope of Permissible Victim Impact Statements.

This Court's opinions have created confusion as to whether the States may constitutionally permit a

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by statute, and in more than 30 states by constitutional amendment). These legislative efforts have also included constitutional considerations. A number of recent Congresses have considered, and different Administrations have supported, constitutional amendments to "keep the balance true," *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934), between the rights of victims and those of criminal defendants.

crime victim or crime victim's representative to offer a recommendation on the appropriate sentence to the sentencing judge or jury. The source of this controversy is dictum in a footnote in *Payne v. Tennessee*, 501 U.S. 808 (1991). The Court there held that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." *Payne*, 501 U.S. at 827. In so holding, the Court clearly and explicitly overruled *Booth v. Maryland*, 482 U.S. 496 (1987), which prohibited the admission of such a victim impact statement.

The Court in *Payne* limited the scope of its decision, however, with the following footnote:

> Our holding today is limited to the holdings of *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989) that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing. *Booth* also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and *the appropriate sentence* violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

Payne, 501 U.S. at 830 n.2 (emphasis added). *See also id.* at 833 (O'Connor, J., concurring) ("*Booth* also addressed another kind of victim impact evidence opinions of the victim's family about the crime, the

defendant, and the appropriate sentence. As the Court notes in today's decision, we do not reach this issue as no evidence of this kind was introduced at petitioner's trial.")

The puzzle, however, is that the Court in *Booth* was not presented with, did not address, and therefore could not and did not erect a bar against victims' characterizations about the appropriate sentence. The victim impact statement in *Booth* contained two types of victim information: "First, it described the personal characteristics of the victims and the emotional impact of the crimes on the family. Second, it set forth the family members' opinions and characterizations of the crimes and the defendant." *Booth*, 482 U.S. at 502. The jury was not presented with any victim recommendation for or characterization of the appropriate sentence. There were passing statements from the victims' son that he "doesn't think anyone should be able to do something like that and get away with it" and from the victims' daughter that "she doesn't want them to be able to do this again or put another family through this," *id.* at 508, which the Court rightly described as characterizations of the crimes and the defendant.

The Arizona Supreme Court summarized the situation well:

> The victims' statements in *Booth* only indirectly hinted at the punishment the victims were recommending. Indeed the only statements regarding sentencing were that the victims did not "think anyone should be

> able to do something like [the murders at issue] and get away with it" and that "the people who did this could never be rehabilitated." *Booth*, 482 U.S. at 508. No specific recommendations regarding sentencing were made. Thus the facts in *Booth* make it unclear whether the Court in that case considered the effect of the Eighth Amendment on opinions regarding sentencing. In *Payne*, however, the Court characterized *Booth* as prohibiting not only family members' opinions and characterizations, but also recommendations of "the appropriate sentence." *Payne*, 501 U.S. at 830 n.2.

Lynn v. Reinstein, 68 P.3d 412, 416 n.4 (Ariz. 2003).[3]

Payne thus ascribed to *Booth* a category of victim information that was not present in that case. This erroneous characterization of the victim statements at issue in *Booth* is the center of the current controversy. The Court's mischaracterization not only

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[3] That *Booth* did not consider a victim sentencing recommendation is underscored by the history of *Ohio v. Huertas*, 498 U.S. 336 (1991). In reversing a death sentence because the jury considered a victim's sentencing recommendation, the Ohio Supreme Court stated, "The type of evidence given by the victim's family in this case goes beyond that considered in *Booth* and *Gathers*. Here, a family member offered his opinion on what the appropriate sentence would be for the defendant." *State v. Huertas*, 553 N.E.2d 1058, 1064 (Ohio 1990). This Court granted certiorari, 498 U.S. 807 (1991), but dismissed the petition as improvidently granted, 498 U.S. 336 (1991), apparently because the victim's sentencing recommendation could be excluded independently under state evidentiary rules.

reserved for later consideration the question presented in this petition, but also implicitly and anomalously "preserves" a rule – a *per se* ban on victim sentencing recommendations – that did not exist in prior law.

Members of this Court have recently noted the uncertainties in victim impact jurisprudence spawned by its rulings. In *Kelly v. California*, Nos. 07-11073, 07-11425, 129 S.Ct 564, 172 L.Ed.2d 445 (2008), two petitioning murderers asked this Court to review the admission of victim impact videos into evidence at their trials. While the full Court denied certiorari, two members of this Court (Justices Souter and Stevens) would have granted review. Justice Stevens dissented from the denial of certiorari to explain, "In the years since *Payne* was decided, this Court has left state and federal courts unguided in their efforts to police the hazy boundaries between permissible victim impact evidence and its impermissible, 'unduly prejudicial' forms." 129 S.Ct. at 566.

B. The Impact of the Confusion Caused by this Court's Precedents is a Split of the Courts Below.

Interpreting and applying this Court's decisions in *Booth* and *Payne*, the lower courts fundamentally disagree over whether *Booth* erected a *per se* bar against victim sentencing recommendations in capital

cases and whether any such bar survives *Payne*.[4] The conflict, in essence, is one over the baseline Eighth Amendment rule before and after the dictum in *Payne*.

The Court of Appeals for the Tenth Circuit has held that "the portion of *Booth* prohibiting family members of a victim from stating 'characterizations and opinions about the crime, the defendant, and the appropriate sentence' during the penalty phase of a capital trial survived the holding in *Payne* and remains valid." *Hain v. Gibson*, 287 F.3d 1224, 1238-39 (10th Cir. 2002) (quoting *Payne*, 501 U.S. at 830 n.2). *See also Hooper v. Mullin*, 314 F.3d 1162, 1174 (10th Cir. 2002) (same). The flaw in the Tenth Circuit's reasoning is that it did not question the assertion that *Booth* considered sentencing recommendations, which resulted in a conclusion that *Payne* left intact a holding that the Eighth Amendment erected a *per se* bar against victim sentencing recommendations. As noted above, whether this bar existed in *Booth* is less than clear. Like the Tenth Circuit, the court below

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[4] With regard to non-capital cases, the lower courts agree that there is no constitutional bar against sentencing recommendations in victim impact statements. *See* Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 289 n.51 (2003) ("Every state ruling on the constitutionality of victim recommendations in noncapital cases has held that trial court judges can hear all three types of impact evidence, including sentencing recommendations that are in the public interest.") (collecting authorities).

and the Courts of Appeals for the Eighth Circuit,[5] the Fifth Circuit,[6] and the Fourth Circuit[7] in dictum and the highest courts of Alabama,[8] Maryland,[9] New Jersey,[10] Ohio,[11] Tennessee,[12] Virginia,[13] and Washington[14] have reached similar conclusions with little to no critical analysis of the underlying assumption regarding the scope of the *Booth* holding.

The Arizona Supreme Court has questioned the assertion that *Booth* erected a *per se* bar against sentencing recommendations. Ultimately, however, the Arizona Supreme Court agreed with the Tenth Circuit. Delving further into the history of *Booth* and *Payne*, the court correctly noted that "the facts in

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[5] *See Parker v. Bowersox*, 188 F.3d 923, 931 (8th Cir. 1999), *cert. denied*, 529 U.S. 1038 (2000) (dictum).

[6] *See Woods v. Johnson*, 75 F.3d 1017, 1037-38 (5th Cir. 1996) (dictum).

[7] *See Ivey v. Catoe*, 36 Fed. Appx. 718, 725-26 (4th Cir. 2000), *cert. denied*, 537 U.S. 952 (2002) (dictum).

[8] *See Ex parte McWilliams*, 640 So. 2d 1015, 1017 (Ala. 1993).

[9] *See Ware v. State*, 759 A.2d 764, 783-86 (Md.), *cert. denied*, 531 U.S. 1115 (2000).

[10] *See State v. Koskovich*, 776 A.2d 144, 177 (N.J. 2001).

[11] *See State v. Fautenberry*, 650 N.E.2d 878, 882 (Ohio), *cert. denied*, 516 U.S. 996 (1995).

[12] *See State v. Middlebrooks*, 995 S.W.2d 550, 558 (Tenn. 1999).

[13] *See Beck v. Commonwealth*, 484 S.E.2d 898, 903-04 (Va. 1997).

[14] *See State v. Pirtle*, 904 P.2d 245, 269 (Wash. 1995), *cert. denied*, 518 U.S. 1026 (1996).

Booth make it unclear whether the Court in that case considered the effect of the Eighth Amendment on opinions regarding sentencing." *Lynn*, 68 P.3d at 416 n.4. However, the court "defer[red] to the Court's interpretation of its own case," and held that "*Payne* did not overrule and indeed left intact that portion of *Booth* which the Court itself has characterized as prohibiting victims from recommending a sentence in a capital case." *Id.*

In stark contrast to the above-cited courts stands the Oklahoma Court of Criminal Appeals, the State's criminal court of last resort, which has definitively reached the opposite conclusion and consistently permits victims to recommend the appropriate sentence in capital cases. "In at least three decisions, this Court has taken the position that *Payne* appears to have overruled *Booth* with respect to the issue of whether or not victim impact statements could include characterizations of the defendant, the crime, and opinions in regard to sentencing." *Murphy v. State*, 47 P.3d 876, 885 (Okla. Crim. App. 2002), *cert. denied*, 538 U.S. 985 (2003), (citing *Turrentine v. State*, 965 P.2d 955, 980 (Okla. Crim. App. 1997), *cert. denied*, 525 U.S. 1057 (1998)), *Ledbetter v. State*, 933 P.2d 880, 890-91 (Okla. Crim. App. 1997); *Conover v. State*, 933 P.2d 904, 920 (Okla. Crim. App. 1997). Noting that this Court has denied past petitions presenting the question, and that it has "continued to approve of such evidence in other capital cases," the Oklahoma Court of Criminal Appeals reaffirmed its consistent rejection of the argument that its

"interpretation of *Payne* and *Booth*, or for that matter our own statute, is erroneous or unconstitutional." *Murphy v. State*, 47 P.3d at 885 (citing *Young v. State*, 12 P.3d 20 (Okla. Crim. App. 2000), *cert. denied*, 532 U.S. 1055 (2001), and *Welch v. State*, 2 P.3d 356 (Okla. Crim. App.), *cert. denied*, 531 U.S. 1056 (2000)).

C. Only this Court Can Resolve the Conflict as to Whether the Eighth Amendment Bars Victim Sentencing Recommendations in a Capital Case and this Case Presents an Appropriate Vehicle for Clarification.

This Court's opinions in *Booth* and *Payne* are the crux of the confusion and conflict across the country; consequently, it will only be when this Court speaks on the issue again that the conflict will be resolved. Because the courts on each side of the split have repeatedly entrenched in their positions even after consideration of the alternative, there is no value to letting the conflict continue. Further, the petition before this Court provides a good vehicle for resolution of the matter.

As noted above, a number of petitions for review from cases decided by the Oklahoma Court of Criminal Appeals have been presented to this Court. Notably, however, each posed a vehicle problem to this Court's consideration of the question presented. In two cases, the petitioner did not object and their arguments were dismissed on plain error review. *See Murphy*, 47 P.3d at 885; *Welch*, 2 P.3d at 373. The

defendant in another case failed to elicit the victim's opinion on the appropriate sentence and unsuccessfully sought to reopen the proceedings to consider her recommendation of life. The appellate court held that the victim recommendation would have been admissible, but that the trial court did not abuse its discretion in denying the motion to reopen. *Young*, 12 P.3d at 43. In *Turrentine*, the Oklahoma Court of Criminal Appeals held that any constitutional error was harmless beyond a reasonable doubt. 965 P.2d at 982. Likewise, although the Tenth Circuit has held twice that the Oklahoma courts erroneously permitted victim opinions on the appropriate sentence, it further held in each case that "this constitutional error was harmless because it did not have a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Hooper v. Mullin*, 314 F.3d 1162, 1174 (10th Cir. 2002) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)); *see also Hain v. Gibson*, 287 F.3d 1224, 1239 (10th Cir. 2002).

This case presents no such barriers to the Court's consideration of the question presented and, by contrast, provides a vehicle for the Court to address the panoply of questions relevant to the conflict and confusion in the lower courts.

II. The Eighth Amendment Does Not Erect a *Per Se* Bar Against Victim Sentencing Recommendations in a Capital Case.

This Court can resolve the conflict in the lower courts and eliminate the confusion in the law with a straightforward clarification: the holding in *Payne v. Tennessee* that "the Eighth Amendment erects no *per se* bar" against victim statements to the jury includes statements about the appropriate sentence. 501 U.S. at 827. "There is no reason to treat such evidence differently than other relevant evidence is treated." *Id.* This reading would be well in line with this Court's Eighth Amendment jurisprudence.

This Court has long recognized that the Eighth Amendment's prohibition on cruel and unusual punishment "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910). Further, the Eighth Amendment's prohibition against cruel and unusual punishment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). "Evolving standards of decency that mark the progress of a maturing society" recognize that victims, like defendants, should be fully heard at sentencing.

A. Fairness to Victims at Sentencing is Critical to the Administration of Justice.

The cornerstone of this Court's decision to overrule *Booth* (and the follow-on decision in *Gathers*) was fairness – fairness to the victim and fairness in the administration of justice. The *per se* bar to victim impact statements erected by *Booth* "unfairly weighted the scales in a capital trial." *Payne*, 501 U.S. at 822.

In *Payne*, this Court noted that a litany of persons – the defendant's girlfriend and parents, and even a psychologist – testified favorably about the defendant during sentencing, *id.* at 825-26, while very little was allowed to be said about the victim. *Id.* at 826. The fact that this litany of the defendant's family and friends were testifying in a capital sentencing hearing also makes plain that the defendant's witnesses were implicitly (and perhaps even explicitly) offering *their* opinion on the appropriate sentence – i.e., that the defendant should not receive a capital sentence.

In *Payne,* this Court recognized the manifest unfairness of the *per se* bar erected by *Booth* and quoted the Tennessee Supreme Court approvingly:

> It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the

> character of, or the harm imposed, upon the victims.

Id. at 826 (*quoting State v. Payne*, 791 S.W.2d 10, 19 (Tenn. 1990)).

During the penalty phase of a capital trial, Utah law specifically affords the defendant a right of allocution. *See* Utah Code Ann. § 76-3-207(2)(b). This right of allocution permits not only the defendant, but also his family, to recommend a sentence to the jury. Utah law regarding defendant allocution is similar to those in the vast majority of states, as "courts regularly allow 'pleas for mercy' by defense witnesses. Allocution, when the capital defendant himself addresses the sentencing authority on the question of death, inevitably bears a close similarity as well." Wayne A. Logan, *Opining On Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517, 545-46 (2000).

In Utah, victims are statutorily and constitutionally afforded a similar right to allocute. *See* Utah Const., art. I, § 28; Utah Code Ann. § 77-38-4(1)(b); and Utah Code Ann. § 76-3-207.[15] Despite this clear expression of the view of Utah's citizens, the Utah Supreme Court has now effectively limited the breadth

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[15] This statute was passed in the wake of *Payne* and *after* the Utah Supreme Court raised questions about the admissibility of victim impact evidence in Utah capital cases as a matter of state law. *State v. Carter*, 888 P.2d 629, 652-53 (Utah 1995), discussed below. *State v. Ott*, No. 20040638, 2010 WL 11138 at *5 (Utah Jan. 5, 2010).

of victims' rights, based on its conclusion that "The testimony offered at Mr. Ott's sentencing falls squarely within the categories of evidence identified as inadmissible, in capital sentencing hearings, by *Payne* and *Booth*." *State v. Ott*, No. 20040638, 2010 WL 11138 at *9 (Utah Jan. 5, 2010). Thus, despite this Court's decision in *Payne*, fairness for victims remains elusive because, regardless of similar legislatively crafted rights for defendants and victims, court interpretation of those rights is creating vast disparity in the meaning of each.

B. State Law Has Evolved to Recognize that Victim Allocution at Sentencing, Including Sentencing Recommendations, is a Necessary Component of Fairness and Justice.

States across the country recognize the importance of victims being given the opportunity to speak freely at sentencing. "The constitutions or statutes of forty states either explicitly or implicitly grant victims the right to give recommendations at sentencing. Twenty-three of these states grant victims the constitutional right to address the sentencing authority. Seventeen states do not have the right in their constitutions but grant the right by statute."[16] As noted above, Utah is among the states providing

[16] *See* Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 286-87 (2003); *see also id.* at 301-05 (collecting authorities).

victims in capital cases with the right to be heard at sentencing. Likewise, federal law entitles victims to "make a statement or present any information in relation to the sentence." Fed. R. Crim. Proc. 32(c)(3)(E).[17]

By overwhelmingly passing legislation allowing victims to speak freely at sentencing, states across the country are recognizing a basic principle – that victims are affected by the underlying crime and therefore should, like the defendant, have an unfettered voice at sentencing.[18] As Justice O'Connor observed,

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[17] The Crime Victims' Rights Act, 18 U.S.C. § 3771(a), also requires that victims be given the right to be reasonably heard at sentencing. 18 U.S.C. § 3771(a)(4). Congress intended this right to include the right to give a sentencing recommendation. 150 Cong. Rec. S2468 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) ("When a victim invokes this right [to be heard] during plea and sentencing proceedings, it is intended that he or she be allowed to provide all three types of victim impact – the character of the victim, the impact of the crime on the victim, the victims' family and the community, and sentencing recommendations."); *see also id.* (statement of Sen. Feinstein) ("The victim of crime, or their counsel, should be able to provide any information, as well as their opinion, directly to the court concerning the release, plea, or sentencing of the accused.")

[18] Social scientists have noted the "secondary harm" that may befall victims of crime when they feel they are not given a meaningful role in the criminal justice process. *See, e.g.*, Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7, 22-25 (1987) (describing victims' further victimization by the criminal justice system); Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 Social Justice Research 313, 314 (2002) (noting that "secondary victimization" by the

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> The Eighth Amendment stands as a shield against those practices and punishments which are either inherently cruel or which so offend the moral consensus of this society as to be deemed "cruel and unusual." Certainly there is no strong societal consensus that a jury may not take into account the loss suffered by a victim's family or that a murder victim must remain a faceless stranger at the penalty phase of a capital trial. Just the opposite is true. Most states have enacted legislation enabling judges and juries to consider victim impact evidence.

Payne, 501 U.S. at 831 (O'Connor, J., concurring) (internal quotations omitted).

The only barrier in the way to fully effectuating the victim's right to freely speak at sentencing is the confusion left by the wake of this Court's dictum in *Payne*. The Court in this case can ensure that victims' rights, as they have been codified across the nation, are given their full meaning.

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criminal justice system can negatively influence victims' "self-esteem, faith in the future, trust in the legal system, and faith in a just world"). This secondary harm is felt most acutely when the victim perceives that she has been treated poorly in relation to the defendant. *See* Task Force on the Victims of Crime and Violence, *Executive Summary: Final Report of the APA Task Force on the Victims of Crime and Violence*, 40 Am. Psychologist 107, 109 (1985) (noting secondary harm occurs because the victim "perceives that the 'system's resources are almost entirely devoted to the criminal, and little remains for those who have sustained harm at the criminal's hands' ").

C. Any Danger of Prejudice from Victim Allocution that Includes a Sentencing Recommendation Can be Tempered by the Use of Evidentiary Rules and Does Not Require a *Per Se* Bar.

Courts in non-capital cases clearly recognize that victims, like defendants, should have the right to speak freely at sentencing. In fact, as noted above, no court has held that the Constitution prohibits victims from opining on the appropriate sentence in non-capital cases.[19]

While death is different, no salient differences distinguish capital and non-capital cases when it comes to the victim's right to make a statement at sentencing. Ultimately, any Constitutional rationale for excluding certain types of victim impact evidence in capital cases would turn on the possibility of prejudice to the jury.[20] Notably, social science research "directly contradicts the assumption that jurors are readily influenced, much less prejudiced, by participant recommendations."[21]

Moreover, the evidentiary rules, under which "courts routinely exclude evidence that is unduly inflammatory," *Payne*, 501 U.S. at 831 (O'Connor, J.,

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[19] Beloof, *supra* note 16, at 289 n.51.

[20] *Id.* at n.60.

[21] *Id.* (citing Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306, 340 (2003)).

concurring), can contain any risk that a victim's sentencing recommendation to a capital jury would be unduly prejudicial. Similarly, the Due Process Clause controls the risk of prejudice in cases where "a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair." *Id.*

No justification exists to single out victim opinions about the appropriate sentence for a *per se* bar. The Oklahoma Court of Criminal Appeals has recognized the lack of logic and unfairness in singling out victim sentencing opinions for *per se* treatment and allows "a simple statement of the recommended sentence without amplification."[22] A *per se* bar to all victim capital sentencing recommendations is unnecessarily broad given the ability of the trial court to properly focus the jury's deliberations and maintain courtroom decorum through the use of instructions.[23]

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[22] *Conover v. State*, 933 P.2d 904, 921 (Okla. Crim. App. 1997).

[23] In this case, the Utah Supreme Court never addressed whether the victims' family could give some limited form of opinion about the crime or the sentence. Instead, it flatly held that the Constitution (as interpreted by this Court in *Booth* and *Payne*) barred any opinion evidence whatsoever. Consequently, this Court does not have a record before it of how rules and court instructions can properly contain any risk of prejudice.

CONCLUSION

For the foregoing reasons, and for those provided by Petitioner, the Court should grant the petition for certiorari.

Respectfully submitted,

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